4-650

Supreme Court of the United States.

No. 778.

ENOS LOWE AND WILLIAM W. LOWE,
Plaintiffs in Error,

vs.

JESSE WILLIAMS, *Defendant in Error.*

In Error to the Supreme Court of the State of Nebraska.

BRIEF FOR DEFENDANT IN ERROR.

W. R. STEELE,
Counsel for Defendant in Error.

WASHINGTON, D. C.:
GIBSON BROTHERS, PRINTERS.
1877.

Supreme Court of the United States.

ENOS LOWE AND WILLIAM W. LOWE, PLAINTIFFS IN ERROR,
vs.
JESSE WILLIAMS, DEFENDANT IN ERROR.

No. 778.

In Error to the Supreme Court of the State of Nebraska.

Brief for Defendant in Error, on the Motion to Dismiss the Writ of Error for Want of Jurisdiction.

STATEMENT OF THE CASE.

The defendant in error, then plaintiff, commenced his action against the plaintiffs in error, then defendants, in the district court of the second judicial district of the State of Nebraska, on the 9th day of June, 1869, by filing his petition and *præcipe*.

Record, page 2.

The defendants below, appeared and answered on the 22d day of July, 1869.

Record, page 2.

Afterwards, at the October term, 1869, of said court, and on the 29th day of November, 1869, the case was referred

to a special master, to take the proofs and report the same to the court.

Record, page 2.

At the March term, 1871, of said court, a referee was appointed to take the testimony of the parties.

Record, p. 3.

At the June term, 1873, of said court, leave was granted the plaintiff below to file an amended petition, and to defendants to answer.

Record, p. 4.

On the 7th day of March, 1874, stipulation was filed, by agreement of counsel, for the hearing of the cause by the judge of said district court.

Record, p. 26.

At the June term, 1874, of said court, a decree was entered in favor of the plaintiff below, finding him entitled to an accounting, and appointing a referee to state an account between the parties.

Record, p. 161.

On the 27th day of July, 1874, the referee filed his report.

Record, p. 165.

On the 4th day of August, 1874, the defendants below, filed their exceptions to the report of the referee.

Record, p. 165.

* * * * * * *

And afterwards, to wit, at the June term, 1874, of said court, and on the 4th day of August, 1874, a decree was rendered in said case, the Hon. Samuel Maxwell, judge,

presiding, which said decree is in words and figures following, to wit:

JESSE WILLIAMS
vs.
ENOS LOWE AND WILLIAM W. LOWE. } *Judgment.*

This day this cause came on to be heard on a motion for confirmation of the report of the referee heretofore herein filed, and the exceptions thereto this day filed by the defendants, and the court having examined and considered the said report, the findings thereof, and the exceptions thereto, is of opinion that said exceptions should be overruled, and the said report and the findings thereof confirmed, and that judgment should be entered against the said defendants accordingly. To which the said defendants except. And thereupon came the said defendants and filed a motion for a new trial, which motion came on to be heard, and the court being fully advised in the premises, is of opinion said motion should be overruled, and does accordingly overrule the same.

To which the said defendants except.

And thereupon the court makes and files the following findings of facts upon the issues joined in said cause, viz:

(The findings referred to have not been furnished the clerk.)

To which findings the defendants duly excepted.

And thereupon it is considered by the court that the said plaintiff recover against the said defendants the sum of seventy-five hundred thirty-two and $\frac{42}{100}$ dollars, his damages, in form by the said court assessed, and also his costs herein expended, taxed at $31.23; and that said defendants Enos Lowe and William W. Lowe transfer and convey to the plaintiff, the said Jesse Williams, all the right, title, or interest which they or either of them claimed in the said four shares of the capital stock of the Council Bluffs and

Nebraska Ferry Company; and that the said defendants and each of them be excluded from all interest in or control over said shares, and that they, their agents, attorneys, and servants, and each thereof, be forever restrained and enjoined from collecting or receiving or in any way intermeddling with any further moneys or dividends now or hereafter coming into the hands of said Council Bluffs and Nebraska Ferry Company, and payable on said four shares of the capital stock of said company, and from representing or attempting to represent said shares in the meetings of said company, or in any manner interfering with or asserting control of or attempting to control the same, or the property, interest, or rights attached and belonging thereto.

Record, pp. 181–2–3.

And on said 4th day of August, 1874, the defendants below, filed their motion in said court for a new trial, which was overruled by the court.

Record, pp. 183–4.

Afterwards, on the 13th day of August, 1874, the defendants below, filed in the office of the clerk of said court, their appeal bond to perfect their appeal to the supreme court of the State of Nebraska.

Record, pp. 184–5–6.

Afterwards, on the 8th day of July, 1875, the said Jesse Williams, plaintiff and appellee, filed in the supreme court of the State of Nebraska, his motion to dismiss the appeal of defendants and appellants.

Record, p. 189.

On the 14th day of July, 1875, the said Enos Lowe and William W. Lowe, defendants and appellants, filed their motion to strike the said motion to dismiss from the files,

because the said Jesse Williams, had appeared in court by counsel, before filing said motion, and resisted the motion of said defendants and appellants, for a postponement of the argument of said cause and a continuance of the cause.

Record, pp. 191–2.

* * * * *

And on the same day, to wit, July 14, 1875, the following petition for the removal of said cause to the circuit court of the United States for the district of Nebraska was filed in said cause:

STATE OF NEBRASKA SUPREME COURT.

JESSE WILLIAMS, *Appellee*,
vs.
ENOS LOWE AND WILLIAM W. LOWE, *Appellants*.

To the Honorable the Supreme Court of the State of Nebraska:

This, the petition of the above-named appellants, Enos Lowe and William W. Lowe, respectfully shows that they each reside in the State of Nebraska, and each of them is a citizen of the State of Nebraska; that the said appellee, Jesse Williams, is a citizen of the State of Iowa; that the amount in dispute in this suit now pending in this court exceeds the sum of five hundred dollars, exclusive of costs.

That your petitioners desire and do hereby pray that this suit be removed into the circuit court of the United States for the district of Nebraska, as prescribed by law in such case, and pray that this petition and the bond offered by your petitioners be accepted, and that this court do proceed no further in this suit.

Dated July 14, 1875.

ENOS LOWE,
and WILLIAM W. LOWE,
by their attorney, E. WAKELY.

E. WAKELY,
Attorney for Petitioners.

* * * * *

And afterwards, on the 13th day of January, 1876, being a day of the January term of said court, the following proceedings were had and done in said cause.

JESSE WILLIAMS, *Appellee*,
vs.
ENOS LOWE *et al.*, *Appellants*.

This cause came on to be heard, and the same was taken up by counsel, who argued motion for the removal of this said cause to the United States circuit court for the State of Nebraska. And the court being now here, and being fully advised in the premises, determines that this cause is not subject to be so removed, and doth deny said motion for the removal of said cause to said United States circuit court, whereupon exceptions were taken to the ruling of the court by the counsel for appellants.

Record, pp. 192–3.

* * * * *

And afterwards, at the adjourned January term of the court, to wit, on the 30th day of March, 1876, the following decree was rendered in said cause, as the same appears of record therein:

JESSE WILLIAMS,
vs.
ENOS LOWE and WILLIAM W. LOWE.

This cause came on be heard, and the same having been heretofore submitted to the court, it is now here considered that the court below erred in confirming that part of the report of the referee allowing the claim of said plaintiff upon what is known as the "Snyder Note," and that said item, amounting to $1,136.55, should be stricken out and judgment rendered for the balance of amount found due said plaintiff from said defendants, amounting, with inter-

est computed up to the date of this decree, to the sum of seven thousand three hundred and twenty-two and $\frac{12}{100}$ dollars, ($7,322.12,) with costs and accruing costs. It is therefore ordered, adjudged, and decreed by this court that said plaintiffs have and recover of and from said defendants the said sum of $7,322.12, with costs, of the district court, to be taxed, and costs of this court, taxed at $10.25. And it is further adjudged and decreed that said defendants transfer and convey to the said plaintiff all the right, title, and interest which they, or either of them, have or claim in the said four shares of the capital stock of the Council Bluffs and Nebraska Ferry Company, and that the said defendants and each of them be excluded from all interest in or control over said shares, and that they, their agents, attorneys, and servants, and each thereof, be restrained and enjoined from collecting or receiving or in any way intermeddling with any further money or dividends now or hereafter coming into the hands of the said Council Bluffs and Nebraska Ferry Company, and payable on said four shares of the capital stock of said company, and from representing or attempting to represent said shares in the meetings of said company, or in any manner interfering with or asserting control of or attempting to control the same, or the property, interest, or rights attached and belonging thereto.

And it is further ordered that a special mandate issue directing the district court to carry this judgment and decree into execution.

Record, p. 234.

Whereupon the said Enos Lowe and William W. Lowe, the now plaintiffs in error, prosecuted their writ of error to this court.

The record shows that the plaintiff below, commenced

his action in a district court of the State of Nebraska; that the defendants below appeared and answered; that no question as to the jurisdiction of said court was ever raised by said defendants; that the said court, with its jurisdiction undisputed, proceeded to a *final hearing* in said cause, rendering its decree and entering its judgment.

That thereupon the said defendants prosecuted their appeal to the supreme court of the State of Nebraska, to reverse the judgment of the said district court. That after the parties had appeared and proceedings had been had in said supreme court, the said Enos Lowe and William W. Lowe, defendants and appellants, filed their petition praying a removal of said cause to the circuit court of the United States, alleging that *they and each of them were citizens of the State of Nebraska, where the action was pending*, and that the said Jesse Williams, plaintiff and appellee, was a citizen of *another State*, to wit, the State of Iowa.

ON THE MOTION TO DISMISS.

Will this court hear the motion to dismiss for want of jurisdiction before the cause is reached upon the regular call of the docket?

"When such want of jurisdiction is patent, or can be readily ascertained by an examination of the record in advance of an examination of the questions on an argument of the merits, the Supreme Court will entertain a motion to dismiss, without waiting for the time for arguing the case. For, to retain the question until final argument, would put it in the power of every defeated suitor in a court below to obtain a stay of execution for years, and encumber the docket of the Supreme Court upon frivolous pretences."

Abbott's United States Practice, vol. 2, p. 263; Semple *vs.* Hagar, 4 Wallace, 431.

In *ex parte* Russell, 13 Wallace, 664, the Court said:

"Unless some unforeseen inconvenience should arise from the practice, we shall not refuse to hear a motion to dismiss before the term to which, in regular course, the record ought to be returned. It would be likely to prevent great delays and expense, and further the ends of justice."

Whatever doubt may have existed in reference to the practice of this court, in entertaining motions to dismiss appeals or writs of error for want of jurisdiction, in advance of the case being reached in regular course, we believe that it has been the uniform practice since the case of *ex parte* Russell, to entertain such motion in advance of the final argument of the cause, at any time when the question is properly presented, on due notice to the adverse party.

ON THE QUESTION OF JURISDICTION.

The jurisdiction of the Supreme Court is invoked in this cause by reason of the filing in the supreme court of the State of Nebraska, after *final hearing* in an inferior court of that State of an application to remove the case to the circuit court of the United States, and the denial of such application by the said supreme court.

No other question depending upon a construction of the Constitution, treaties, or laws of the United States is presented by the record.

The removal of the cause from the supreme court of the State of Nebraska, was attempted under the act of March 2, 1867, entitled "An act to amend an act entitled 'An act for the removal of causes in certain cases from State courts,'" approved July 27, 1866, (14 Statutes at Large, 558,) which enacts that "where a suit is pending in any State court, in which there is a controversy between a citi-

zen of the State in which the suit is brought and a citizen of another State, *such citizen of another State*, whether he be plaintiff or defendant, if he will file an affidavit, &c., may at any time *before the final hearing or trial of the suit* file a petition for the removal of the *suit* into the next circuit court of the United States to be held in the district where the suit is pending," &c. * *

This act clearly prescribes as one of the conditions upon which a removal can be had, that the application must be made before the final hearing or trial of the suit. If a defendant entitled to a removal neglects to make application therefor, prior to a final hearing or trial in the State court of original jurisdiction, he is then too late to invoke the jurisdiction of the courts of the United States; he cannot stand by and take his chance of succeeding in the State courts, and when the issue is against him *appeal* his case to the circuit court of the United States; he must make his election of tribunals before trial of the issues and judgment thereon. The circuit court cannot review a judgment of the State court; the removal must be taken so that the cause can be tried in said court as if originally commenced therein.

Stevenson *vs.* Wallace, 19 Wallace, 572.
Vannevar *vs.* Bryant, 21 Wallace, 41.
Fashnacht *vs.* Frank, 23 Wallace, 416.

The act of March 2, 1867, was intended to protect non-resident litigants, plaintiff or defendant, from prejudice or local influence. Previous to the passage of that law, defendants within the provisions of the statutes could transfer their causes from the State to the Federal courts; but a non-resident plaintiff who had voluntarily submitted himself to and invoked the jurisdiction of the State court, could not afterwards transfer his case to the courts of the

United States. The act of March 2, 1867, gave that right of transfer, and others not before known; but in no instance did it give a right of transfer to a citizen of the State in which the action was pending.

The language of the act is plain and unequivocal:

"That where a suit is now pending or may hereafter be brought in any State court, in which there is a controversy *between a citizen of the State in which the suit is brought and a citizen of another State*, and the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs, *such citizen of another State*, whether he be plaintiff or defendant," &c. * * *

It is the citizen *of another State* who can take advantage of the act; not the citizen of the State in which the action is pending. In the present case the record (pp. 192 and 193) shows that it was the *resident defendants*, who attempted to transfer the cause from the State to the United States court, upon the allegation that the *plaintiff*, was a citizen *of another State*.

Such transfer was not contemplated by the act.

Case of the Sewing-machine Companies, 18 Wallace, 553, 580.

Gaines *vs.* Fuentes *et.al.*, 2 Otto, 10.

The record in this case shows a tedious litigation in the State courts, extending over a period of six years, before any attempt was made to obtain a removal to the courts of the United States, and we think presents such a case as the court should dispose of upon the motion to dismiss.

"For, to retain the question until final argument, would put it in the power of the defeated suitor in the court below to obtain a stay of execution for years, and encumber the docket of the Supreme Court upon frivolous pretences."

W. R. STEELE,
Counsel for Defendant in Error.

4-658.

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No. 778.

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Plaintiffs in Error,

vs.

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Supplemental Brief for Defendant in Error.

W. R. STEELE,
Counsel for Defendant in Error.

Leave to file motion

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Supplemental Brief for Defendant in Error, on the motion to dismiss the Writ of Error for want of jurisdiction.

By inadvertence of counsel, the statute of March 3, 1875, entitled "An act to determine the jurisdiction of cir- "cuit courts of the United States, and to regulate the re- "moval of causes from State courts, and for other pur- "poses," (18 U. S. Statutes-at-Large, 470 and 471,) was not cited in the original brief. An examination of this statute shows that it repeals all former statutes regulating the removal of a cause from the State courts to the circuit courts of the United States, and that the removal of this cause from the supreme court of the State of Nebraska to the circuit court of the United States for the district of Nebraska was attempted to be had under the act of March 3, 1875, and not under the act of 1867, as argued in the original brief.

This leads us to consider what change has been made in the method of obtaining a removal, by the act of March 3, 1875, and at what time the application for removal must be made under said act. It is provided by—

"SECTION 2. That any suit of a civil nature, at law or in equity, now pending or hereafter brought in any State court, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States shall be plaintiff or petitioner, or in which there shall be a controversy between citizens of different States, or a controversy between citizens of the same State, claiming lands under grants of different States, or a controversy between citizens of a State and foreign States, citizens, or subjects, either party may remove said suit into the circuit court of the United States for the proper district." * * *

And by—

"SEC. 3. That whenever either party, or any one or more of the plaintiffs or defendants entitled to remove any suit mentioned in the next preceding section, shall desire to remove such suit from a State court to the circuit court of the United States, he or they may make and file a petition in such suit in such State court before or at the term at which said cause could be first tried, and before the trial thereof, for the removal of such suit into the circuit court to be held in the district where such suit is pending." * * *

Whatever change may be made by this act, regarding the right to a removal depending upon the citizenship of parties, it is clear that a change has been made as to the time at which the application must be made. By the acts of 1866 and 1867, such application could be made at any time *before the final hearing or trial of the suit.*

By the act of March 3, 1875, such application must be made *before or at the term at which the said cause could be first tried, and before the trial thereof.* The party entitled to a removal, and desiring to avail himself of such privilege, must act promptly, and file his petition therefor before any trial thereof in the State court, and not later than the term at which the cause *could have been first tried.* This is a limitation upon the time at which the application for removal, as it existed under the act of 1866–7, must be made.

In re Scott *et al. vs.* The Clinton & Springfield R.R. Co., 6 Bissell C. C. Reports, 529–535.

Judge DRUMMOND, considering the act of March 3, 1875, says:

* * * "The third section of the act of 1875 declares that a party seeking a removal from the State to the Federal court shall make and file a petition in the suit in the State court before or at the term at which said cause could be first tried, and before the trial thereof. * * * And the question arises as to the true construction of this part of the third section of the act of 1875.

"When is the term at which the cause could be first tried, and when is it that it can be said to be before the trial thereof? Could this cause have been tried or heard before this application was made? We are required to say, upon the facts as they appear in the record, that this cause could have been tried at a term before the application was made. In a case which was recently decided by me at Chicago I held that where a cause was pending in the State court, being a bill in chancery, and where an answer had been filed and an issue thereon, and where it appeared that the cause could have been tried, but that by consent of both parties it had been continued over the term, the application for removal came too late, for the cause was at issue and could have been heard, as it satisfactorily appeared by the court; and, therefore, the action of the parties in postponing it was neither an act of the

law nor of the court, and consequently the application came too late." * * *

"In accordance with the provisions of the Revised Statutes of the United States, enacted June 22, 1874, and the subsequent act of Congress of March 3, 1875, a cause will not be removed from a State court to the circuit court of the United States unless the petition for such removal be filed in the State court before or at the term at which said cause could first be tried, and before the first trial thereof.

"Such petition will not, therefore, be entertained when filed in the State court after a verdict in the cause has been rendered, notwithstanding the verdict may have been set aside for error and a new trial ordered."

Chandler *vs.* Coe, S. C. New Hampshire, reported 3 American Law Times Reports, U. S., 291.

A removal cannot be made under the act of March 3, 1875, of a suit pending in a State court at the time of the passage of that act, in which a trial was had after such passage, though the verdict was set aside and a new trial allowed, and the petition for removal was made at the first term at which the second trial could have been had.

Young *vs.* Andes Ins. Co., C. C. U. S. So. D. Ohio, 3 American Law Times Reports, U. S., 639.

The petition for removal in this cause was not made and filed before or at the term at which said cause could be first tried, and before the trial thereof.

But was made long subsequent to the term of the State court when issue was joined and said cause could have been first tried, and subsequent to the trial thereof, and when said cause was pending on appeal of the now plaintiffs in error, in the supreme court of the State of Nebraska, from a final judgment and decree of the district court of the second judicial district of said State.

The acts of 1866 and 1867, providing for the removal of causes from the State to the Federal courts, gave the cir-

cuit courts of the United States no appellate jurisdiction to review the judgments of the State courts, the cause must have been removed at such time as that the circuit court could proceed in the cause as if originally commenced in said court.

The act of March 3, 1875, clearly gives no such right of appeal to the circuit court; but the application for removal must be made before the trial of the cause in the State court of original jurisdiction.

The only error alleged in the record herein arising under the Constitution, treaties, or laws of the United States, is the refusal of the supreme court of the State of Nebraska to grant the removal of this cause to the circuit court of the United States, as the application for such removal came too late; this court is without jurisdiction, and the cause should for that reason be dismissed.

W. R. STEELE,
Counsel for Defendant in Error.